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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CLUB ACACIA COMMUNITY
ASSOCIATION,

Plaintiff and Respondent,

v.

PROFESSIONAL COMMUNITY
MANAGEMENT OF CALIFORNIA,
INC.,

Defendant and Appellant.

G056313

(Super. Ct. No. 30-2014-00714532)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick Paul Horn, Judge. Affirmed as modified.

Morrison & Foerster, Miriam A. Vogel; Peters & Freedman, Delphi Law Group and Zachary R. Smith for Defendant and Appellant.

Cummins & White, James R. Wakefield and Samantha N. Lamm for Plaintiff and Respondent.

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A homeowners association, property manager, and contractor litigated a dispute arising from a problematic installation of a fire alarm system at a condominium building. A contract containing an arbitration clause governed the relationship between the association and property manager and authorized an award of attorney fees to the prevailing party in arbitration. Neither the association or property manager requested arbitration and instead litigated in the superior court through a jury trial. The association prevailed and, upon a contested motion, was awarded attorney fees by the trial court. Because we find no ambiguity in the arbitration clause, either patent or latent, we modify the trial court's determination that the court had the authority to award attorney fees. In all other respects, the judgment is affirmed.

I

FACTS AND PROCEDURAL HISTORY

A. Jury Trial Verdict and Award of Attorney Fees

In 2005, plaintiff and homeowners association Club Acacia Community Association (Club Acacia) entered into a contract with defendant and property manager Professional Community Management of California, Inc. (PCM) primarily to manage a condominium building. Relevant here, the contract stated PCM would provide property management services to Club Acacia and disputes would be submitted to binding arbitration (the Arbitration Clause): “Arbitration. Any controversy or claim arising out of, or related to, this Agreement shall be settled by binding arbitration in the County of Orange, State of California, in accordance with the then existing rules of the American Arbitration Association and judgment on the arbitration award may be entered in any court having jurisdiction over the subject matter in the controversy. *The Arbitrator shall have authority to award reasonable attorney fees to the prevailing party in the arbitration.*” (Italics added.)

The contract also contained an indemnity provision in favor of PCM (the Indemnity Clause), which read: “Indemnification. Association [, i.e., Club Acacia] hereby agrees to defend, indemnify and hold harmless, Agent [, i.e., PCM] and its employees, agents, officers and directors against any all [*sic*] claims, costs, suits, and damages including attorney fees arising out of the performance of this Agreement or with respect to Agent’s management of the property, including claims and damages and liability for injuries suffered, or death or property damage incurred relating to the Property.”

In 2011, PCM introduced Club Acacia to contractor Stratex Solutions, Inc. (Stratex), for the installation of a new fire alarm system at Club Acacia’s building. The installation did not go well and a lawsuit involving Club Acacia, PCM, and Stratex ensued. Specifically, Club Acacia sued PCM and Stratex in the Orange County Superior Court, triggering cross-complaints filed by both PCM and Stratex against each other as well as Club Acacia.

Despite the Arbitration Clause, neither Club Acacia nor PCM exercised its right to compel arbitration and instead litigated the entire matter in the Orange County Superior Court for almost four years. Club Acacia sought, among other things, “reasonable attorney’s fees” for a breach of contract cause of action against PCM. In its cross-complaint, PCM alleged causes of action for indemnity, contribution, and declaratory relief and requested the award of attorney fees against Club Acacia and Stratex respectively. Prior to the jury trial of the matter, Club Acacia and PCM both submitted trial briefs to the court.

After trial, a jury found PCM liable to Club Acacia for \$88,500, based upon findings of breach of contract against PCM and comparative negligence of 60 percent

against PCM; 20 percent against Club Acacia; and 10 percent against Stratex.¹ Following the verdict, Club Acacia filed a motion for attorney fees pursuant to both the Arbitration Clause and Indemnity Clause. The trial court awarded Club Acacia attorney fees in the amount of \$628,587.50, to be paid by PCM, based upon the Arbitration Clause. Specifically, the court found that although PCM and Club Acacia waived their rights to arbitrate their dispute by litigating in superior court, such conduct did “not necessarily defeat the parties’ intent to allow the prevailing party to recover reasonable attorney fees.” The court found that neither PCM nor Club Acacia knowingly waived the attorney fees provision in the Arbitration Clause but instead, “the parties changed the venue in which this determination [, awarding fees,] is made.” The trial court also cited Civil Code section 1717² for the general proposition that if a contract authorized an awarding of attorney fees to one party then other contracting parties were mutually authorized to seek such fees if they prevailed.

This appeal by PCM followed. In addition to challenging the amount of fees awarded as unreasonable, PCM argues the trial court’s award of fees should be reversed because the contract unambiguously provided for attorney fees to be awarded only by an arbitrator (and not by a judge) following an arbitration (and not a jury trial).

¹ The Special Jury Verdict Form in the record indicates that these were the percentage apportionments of responsibility determined by the jury, notwithstanding the fact that they do not equal 100 percent when added together. The issue is immaterial for the purposes of resolving this matter.

² All further undesignated statutory references are to the Civil Code.

II DISCUSSION

A. Standard of Review

The parties disagree as to the correct standard of review applicable to this appeal. PCM contends this court should independently review all issues regarding contract interpretation on a de novo basis. Club Acacia contends that where contract interpretation turns on the trial court's assessment of extrinsic evidence, substantial evidence review requires deference to the trial court's findings of facts.

Based upon the record before this court, we find that appellate deference to the trial court's findings would be improper because the “interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence.” (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 520.) The extrinsic evidence proffered by Club Acacia are its operative complaint, PCM's cross-complaint, and PCM's trial brief. Although PCM disputes the appropriateness of considering these court documents as extrinsic evidence (discussed further below), it does not dispute that the documents exist. Accordingly, “to the extent the evidence is not in conflict, we construe the [contract], and we resolve any conflicting inferences, ourselves.” (*Schaefer's Ambulance Service v. County of San Bernardino* (1998) 68 Cal.App.4th 581, 586.) We interpret the Arbitration Clause independent of the trial court's findings.

B. Rules of Contract Interpretation

The fundamental principle for contract interpretation is clear: “A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” (§ 1636; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) In determining mutual

intent, “[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (§ 1638.) In other words, “[w]here contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further.” (*Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal.App.4th 1699, 1707-1708.)

C. No Patent Ambiguity

The contract is clear, explicit, and does not involve an absurdity regarding an award of attorney fees. First, we note the Indemnity Clause provides no grounds for an award of attorney fees under the circumstances because it is a unilateral provision existing in favor of PCM only. Unlike an attorney fees provision, an indemnity provision is not made mutual by operation of section 1717 (see *Building Maintenance Service Co. v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014, 1029) so nothing in the Indemnity Clause conferred to Club Acacia a right to be indemnified. Accordingly, only the Arbitration Clause could have authorized an award of attorney fees for Club Acacia.

The disputed language of the Arbitration Clause is clear and explicit: an arbitrator could award attorney fees to a party who prevailed in an arbitration conducted in Orange County, by the rules of the American Arbitration Association. This clarity is further illustrated by the Arbitration Clause’s explicit distinctions between litigation forums and forms of an award because it specifies that an arbitration award can be entered as a final judgment by a court having jurisdiction over the matter. (See § 1641 [“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other”].) The Arbitration Clause is patently unambiguous that attorney fees were to be awarded only by an arbitrator (and not by a judge) following an arbitration (and not a jury trial).

D. Latent Ambiguity is not Demonstrated by the Proffered Extrinsic Evidence

Club Acacia contends the Arbitration Clause contains a latent ambiguity demonstrated by extrinsic evidence. Such evidence can be considered for the purpose of determining whether facially unambiguous language is susceptible to more than one reasonable interpretation. (*Zissler v. Saville* (2018) 29 Cal.App.5th 630, 644.)

As its extrinsic evidence, Club Acacia proffers its own operative complaint, PCM's cross-complaint, and PCM's trial brief. Club Acacia argues the positions expressed within these documents show that the parties intended for an award of attorney fees to be authorized by the Arbitration Clause.

As a threshold issue, PCM disputes whether Club Acacia's proffered evidence qualifies as appropriate evidence of the parties' contracting intent. Specifically, PCM argues that as a general matter, pleadings provide no evidentiary value and even if this is overlooked, because the documents were created after a dispute had arisen, they should not qualify as relevant postcontracting conduct. Case law does hold that postcontracting and predispute party conduct can be a reliable indicator of parties' contracting intent. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1133-1134.) However, the rationale behind this principle is, at the very least, strained when it involves conduct that occurred after a lawsuit was filed, as the proffered evidence does here. (See *Ibid.*; see also *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753 [the reliability of prelitigation conduct as to the parties' mutual intent is high because of the absence of legal conflict].) Indeed, all three cases cited to by Club Acacia involved conduct that occurred prior to litigation beginning and therefore do not provide an authoritative answer as to whether Club Acacia's proffered pleadings and trial brief can be appropriately considered as extrinsic evidence of the parties' mutual intent at

the time of contracting.³ However, we give Club Acacia the benefit of the doubt on this point because it is not dispositive for our determination in this matter.

This is because even if Club Acacia's proffered extrinsic evidence is considered, its substantive balance fails to demonstrate that PCM intended attorney fees to be awarded under the Arbitration Clause without an arbitration. First, it appears that PCM's cross-complaint allegations only sought attorney fees against Club Acacia through the Indemnity Clause and the Code of Civil Procedure, not the Arbitration Clause. Second, Club Acacia has not proved its argument that PCM's mention of "pre-litigation fees" in its trial brief demonstrates a position that attorney fees were awardable under the Arbitration Clause without an arbitration. Specifically, Club Acacia fails to cite to any portion of the record demonstrating that PCM was protesting only "pre-litigation fees" to the exclusion of other attorney fees claimed by Club Acacia. Moreover, contrary to its arguments now (after prevailing), a footnote in Club Acacia's own trial briefs appears to demonstrate its own pretrial understanding that attorney fees were *not* recoverable under the Arbitration Clause because there was no arbitration conducted.⁴

³ The cases cited to by Club Acacia are *Wolf v. Walt Disney Pictures and Television*, *supra*, 162 Cal.App.4th 1107, 1127-1128 [testimony of a former senior vice president about her agreement with plaintiff when an agreement was negotiated 12 years prior to the at-issue litigation]; *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393-394 [concealment of business information more than 10 years prior to litigation tended to show that party did not believe its asserted interpretation of the contract]; and *Crestview Cemetery Assn. v. Dieden*, *supra*, 54 Cal.2d 744, 752-753 [parties' conduct regarding completion of legal representation preceded dispute].

⁴ The following footnote appears in the original and amended trial brief of Club Acacia as a cross-defendant: "Attorney fees are not recoverable under the Management Agreement which solely allows for recovery of attorney fees under section 7.5 of the arbitration clause that authorizes the arbitrator to award attorney fees to the prevailing party in arbitration. There are no other attorney fee provisions in the Management Agreement."

Accordingly, even if Club Acacia's proffered extrinsic evidence is considered, it does not demonstrate the parties' intent that the Arbitration Clause authorized attorney fees to be awarded by a court without an arbitration. The Arbitration Clause contains no latent ambiguity.

E. Case Law Does not Support an Award of Attorney Fees

The parties dispute whether this court's previous decision in *Kalai v. Gray* (2003) 109 Cal.App.4th 768 (*Kalai*), which construed an arbitration provision's authorization of attorney fees, compels a conclusion in this matter. In *Kalai*, this court was presented with a challenge to an award of attorney fees in favor of a defendant who had prevailed on a motion for summary judgment on the grounds that arbitration was required by contract. (*Id.* at p. 777.) This court held the trial court erred in finding the plaintiff had waived his right to arbitrate by filing his lawsuit with the trial court (i.e., plaintiff was still entitled to arbitrate the dispute) and reversed the award of attorney fees because, according to the controlling arbitration clause, the defendant was not entitled to attorney fees absent arbitration. (*Id.* at pp. 776-777.)

PCM contends the contract interpretation performed in *Kalai* supports its argument that the Arbitration Clause is to be construed as a "limited" provision which authorized attorney fees to be awarded only where an arbitration occurred. Club Acacia contends *Kalai* is inapposite because the award of fees here followed a jury trial and therefore was not premature like the one in *Kalai*. Club Acacia also contends *Kalai* is distinguishable because the specific language of the arbitration provision there was not the same as the Arbitration Clause. While we agree the holding in *Kalai* does not directly apply to the factual circumstances presented in this matter, we find the analysis in *Kalai* does apply insofar as demonstrating that the Arbitration Clause consists of clear, limited language which should simply be enforced as such. (See *Kalai, supra*, 109 Cal.App.4th at p. 778.) In other words, the reasoning in *Kalai* supports a construction of the

Arbitration Clause where attorney fees were to be awarded only by an arbitrator (and not by a judge) following an arbitration (and not a jury trial).

Next, Club Acacia cites to *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534 (*Ajida*), as support for its argument that the Arbitration Clause should be interpreted broadly to affirm the trial court's award of attorney fees. In *Ajida*, the Sixth District Court of Appeal was presented with an arbitration award which directed the defendants (among other things) to pay attorney fees for "future disputes arising out of the award." (*Id.* at pp. 538-539, fn. omitted.) The *Ajida* court held, under the specific facts presented, the parties' contractual duty to arbitrate disputes survived termination of the underlying contract (*id.* at p. 545), and found that the broadly worded fee provision authorized an award of attorney fees incurred for related judicial proceedings. (*Id.* at p. 552.) Club Acacia claims that the Arbitration Clause in this matter "is also broad enough" to authorize an award of attorney fees.

However, the relevant facts of *Ajida* show that it is not applicable to this matter. First, *Ajida* involved a court proceeding which followed an arbitration and arbitration award, in obvious contrast to the facts of this matter. Second, the *Ajida* court interpreted broadly worded language from the arbitration award, which provided that "contractual attorneys' fees clause 'shall be applicable to any dispute arising under or related to this Final Award.'" (*Ajida Technologies, Inc. v. Roos Instruments, Inc.*, *supra*, 87 Cal.App.4th at pp. 551-552.) In contrast, the language authorizing attorney fees in the Arbitration Clause is limited, as discussed above. This, coupled with the fact that no arbitration occurred here demonstrates that *Ajida* does not support any broad interpretation of the Arbitration Clause. Accordingly, case law does not compel a finding that the Arbitration Clause authorized attorney fees to be awarded by the court without arbitration.

F. Section 1717 is not Implicated

Section 1717 does not compel any particular interpretation of the Arbitration Clause in this matter. Club Acacia contends section 1717, subdivision (a), prohibited a waiver of the attorney fees provision in the Arbitration Clause and therefore the trial court's award of attorney fees was valid. PCM responds that section 1717, subdivision (a), never applied to this case because the Arbitration Clause did not authorize an award of attorney fees to either party where the dispute was litigated through a superior court action.

Section 1717 is a statute meant to ensure mutuality of access to attorney fees: where a provision for awarding attorney fees is unilateral, section 1717 by operation of law makes such a clause bilateral. (*California-American Water Co. v. Marina Coast Water Dist.* (2017) 18 Cal.App.5th 571, 576-577.) What the statute does *not* do is authorize an award of attorney fees where it is mutually unavailable based upon contractual language. For example, in *Leamon v. Krajewicz* (2003) 107 Cal.App.4th 424, 427, 431-433, the Fifth District Court of Appeal affirmed a trial court's denial of attorney fees based upon findings that a condition precedent (mediation) listed in the underlying contract mutually applied to both parties, had not been satisfied, and therefore validly did not authorize an award of attorney fees by its own language. Similarly, here, the Arbitration Clause did not authorize a court to award attorney fees to either PCM or Club Acacia, if no arbitration had occurred. Accordingly, Club Acacia's argument based upon section 1717, subdivision (a), fails because the fee provision in the Arbitration Clause did not have to be waived; it was simply limited by its own words to an arbitration and, therefore, attorney fees were not awardable regardless of waiver.

G. Application of Contra Proferentem is not Demonstrated and Would not be Applied in any Case

Finally, Club Acacia contends the Arbitration Clause should be construed against PCM's position in this matter because PCM drafted the contract and "ambiguities in written agreements are to be construed against their drafters." (§ 1654; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247.) This argument fails because Club Acacia does not cite to any evidence demonstrating the contract's authorship. (See *Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 514 [a party's failure to support an argument with citations to the record results in a waiver of the argument].) Further, even if PCM's authorship of the contract was established, Club Acacia's argument would still fail because the Arbitration Clause's lack of ambiguity would rule out a resort to construing the clause against PCM's position. (See *B.L. Metcalf General Contractor, Inc. v. Earl Erne, Inc.* (1963) 212 Cal.App.2d 689, 695-696 [rule that contract language should be interpreted against drafter is not determinative when contract may be properly construed by application of other rules of construction].)

Based upon our finding that the Arbitration Clause did not authorize the trial court's award of attorney fees in this matter, we do not need to consider PCM's secondary argument that the fees awarded were unreasonable.

III

DISPOSITION

The judgment is modified to eliminate the award of attorney fees to Club Acacia. In all other respects, the judgment is affirmed. PCM is entitled to costs in this appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.